Supreme Court, U.S.
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No. 96-1777

In The

Supreme Court of the United States

October Term, 1997

E. I. DUPONT DE NEMOURS AND COMPANY,

Petitioner,

v.

THE BUSH RANCH, INC., WILLIAM R. LAWSON, YELLOW RIVER GROWERS, ROY PHILLIP BARBER, CAROL H. BARBER, AND C. RAKER & SONS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD H. GILL
COPELAND, FRANCO SCREWS & GILL, P.A.
444 South Perry Street
P. O. Box 347
Montgomery, Alabama 36101-0347
(334) 834-1180

C. NEAL POPE*
MAX R. MCGLAMRY
WADE H. TOMLINSON, III
POPE, MCGLAMRY, KILPATRICK & MORRISON, LLP
318 11th Street, 2nd Floor
P. O. Box 2128
Columbus, Georgia 31901-2128
(706) 324-0050

Attorneys for Respondents

**Counsel of Record for Respondents upon whom service is to be made.*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit erred in denying the inherent power of the District Court to regulate court proceedings through the imposition of civil sanctions, including monetary sanctions, thereby creating a conflict with the Fifth Circuit and a relevant decision of this Court?

II. Whether the Eleventh Circuit erred, subsequent to its Opinion filed October 17, 1996, in entering an Order of November 4, 1996, that upon remand, the Chief Judge of the district reassign all future proceedings in the action to a different District Judge, there having been no error assigned, nor any hearing held, where briefing or argument was permitted with regard to removal of the District Court Judge presiding in the case?

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I. STATEMENT OF THE CASE

A. Overview

This case can present issues of enormous importance to district courts and litigants in the fair conduct of civil litigation. Those issues, as phrased by Respondents, call for the exercise of this Court's supervisory power to settle a conflict within the circuits, to decide an important question of federal law that has not been decided by this Court, and to correct an erroneous decision in conflict with a relevant decision of this Court. This matter merits review only of those issues. DuPont's issues do not merit review, for this case was handled and decided in the District Court as a civil sanctions matter pursuant to that Court's inherent powers and not as a criminal contempt proceeding. DuPont has recognized as much, stating in its Eleventh Circuit Petition for Rehearing at p. 14: "[T]his is a civil action. It was docketed, captioned and treated below as such." If DuPont is right that there is no independent cause of action for civil contempt, *see* DuPont's Pet. at 7, then this admittedly civil action *must* have been one for civil sanctions, and it should have been reviewed as such for any abuse of discretion as to the sanctions imposed. Instead, having persuaded the Eleventh Circuit that what proceeded as a civil sanctions matter was somehow converted to a criminal contempt, DuPont now boldly urges that the matter be dismissed and that it escape unsanctioned despite clear and convincing evidence that it committed an egregious fraud on the court. Neither law nor logic supports such a result.

Respondents submit that the Eleventh Circuit has remanded this matter for the imposition of civil sanctions

in accord with its opinion, notwithstanding any separate action that the United States Attorney might take with regard to prosecution of a criminal action against DuPont. If this reading is not correct, then a writ of certiorari should be issued, because a real conflict then exists between the decision in the instant case, and *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) and *Carroll v. The Jaques Admiralty Law Firm*, 110 F.3d 290 (5th Cir. 1997), where the Fifth Circuit, following *Chambers*, squarely held that a district court may impose civil sanctions, *including a monetary fine*, using its inherent powers, pursuant to a show cause order issued post-judgment and after hearing held at which evidence was considered and findings made.[1]

B. Statement of Facts

Respondent nurserymen were Plaintiffs in three separate actions filed in 1992. Their claims were among hundreds made for damages caused by DuPont's fungicide Benlate 50DF. Respondents' actions, and a fourth, were consolidated for trial which began July 6, 1993. In that litigation, named *Bush Ranch* for one of the nurserymen, Plaintiffs alleged Benlate had been contaminated by toxic herbicides called sulfonylureas (SUs) which were manufactured at the same DuPont plant where DuPont manufactured the active ingredient in Benlate. Contrary to DuPont's statements, its discovery efforts were not

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[1] The remainder of this Response in Opposition assumes that the Eleventh Circuit has precluded any award of civil sanctions and thus that certiorari will be granted.

herculean.[2] DuPont limited discovery to a closed universe of documents that it had selected as relevant, and it opposed, resisted and obstructed discovery that went beyond that closed universe. During *Bush Ranch*, the Court expended vast judicial resources, including *10* hearings, trying to bring DuPont into compliance with its obligations as a litigant, the Federal Rules of Civil Procedure, its agreements, and that Court's orders. The Court addressed DuPont's gross discovery misconduct in

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[2] *See* DuPont's Pet. at 2. Respondents advise the Court, pursuant to Rule 15(2), of additional misstatements, including that: during trial, DuPont represented to the District Court *not* that the Alta Labs chemists were experts, but that they were fact witnesses, statements consistent with the common sense notion that the tests conducted by Alta and the methods and results of such tests are facts (DuPont's Pet. at 2); the pre-trial conference was not transcribed, and nothing said during that conference or in the Pre-trial Order relieved DuPont of its obligations to produce all data and documents relating to Benlate or authorized a limited understanding of the requirement that parties should produce and identify during depositions all documents on which experts based their opinions (DuPont's Pet. at 2); Alta chemists, DuPont witnesses and experts have testified that the Alta data and documents could support arguments and conclusions that SUs were indeed present in the soils and waters of the *Bush Ranch* Plaintiffs (DuPont's Pet. at 2-3); irrelevant allegations – that certain of the former *Bush Ranch* Plaintiffs (but none of those whose cases were tried) threatened to sue their former counsel, that the Judge, or a member of his staff, provided inside information to Plaintiffs' counsel and that Plaintiffs abruptly approached DuPont and settled for 1% of the prayed for compensatory damages – are unsupported by any credible or competent evidence (DuPont's Pet. at 3-4); the District Court did not adopt its 67-page Opinion and Order largely verbatim from Respondents' 149-page proposed findings and conclusions (DuPont's Pet. at 4).

12 written orders. App. at 31a-32a. Twice the Court imposed conditional monetary civil sanctions against DuPont. App. at 31a, 33a, 85a. On two other occasions, the Court ordered DuPont to pay costs, expenses and attorney's fees as sanctions. App. at 32a.

After *Bush Ranch* ended in settlement, Respondents became aware of evidence concealed by DuPont showing that the soils and waters taken from their lands for testing purposes *were contaminated* by DuPont's SUs. Alta Laboratories conducted these tests. The data and documents associated with the tests plainly should have been produced. They were not.[3] Through documents, arguments and testimony, DuPont misrepresented to Plaintiffs, the District Court and the jury the nature and the results of these tests. After conducting their own inquiry, Respondents filed a Petition praying that the District Court impose civil sanctions against DuPont for its fraud on the Court during and at the conclusion of the *Bush Ranch* product liability actions. *See* App. at 95a. After review of said Petition, the District Court issued a Show Cause Order.

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[3] DuPont did not willingly produce the Alta data and documents in Hawaii pursuant to a request, *see* DuPont's Pet. at 3; DuPont produced the materials, which during *Bush Ranch* had not been identified on any privilege log, *only after* the Hawaii Supreme Court rejected DuPont's protracted efforts to keep them concealed. Contrary to DuPont's statements at p. 10, Plaintiffs' counsel did not know of the volumes of material contradicting the statements, argument and evidence DuPont presented during the *Bush Ranch* litigation when said counsel joined in certifying to the District Court DuPont's apparent compliance with discovery.

C. Course of Proceedings and Disposition of the Case

DuPont fully litigated this matter in the District Court, filing motions to recuse the Judge, vacate the Show Cause Order and dismiss. It *never* urged that the matter was, or that it be converted into, a criminal proceeding; its witnesses never invoked the Fifth Amendment privilege regarding self-incrimination. DuPont filed an Emergency Motion For Stay and a Petition for Writ of Mandamus and Prohibition in the Eleventh Circuit prior to the hearing, seeking recusal of the Judge and a ruling that the hearing be prohibited. It did not urge in any filing that the matter was a criminal one. The Eleventh Circuit denied these efforts.

The District Court conducted a five-day evidentiary hearing. DuPont examined witnesses, presented evidence and filed a post-hearing submission. The Court entered an Opinion and Order on August 21, 1995, finding by clear and convincing evidence that DuPont had perpetrated a fraud on the Court by the commission of numerous sanctionable acts.[4] The District Court entered

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[4] The Court found that DuPont: consciously withheld and concealed data and documents which were due to be, and which the Court had ordered to be, produced; knowingly argued falsely to the Court and jury; knowingly elicited false testimony from an expert witness; knowingly filed a fraudulent motion to obtain an order vacating that Court's valid existing orders directing DuPont to comply with discovery orders and imposing civil sanctions; and induced reliance on said fraudulent motion so that on August 16, 1993, the District Court signed the order submitted by DuPont vacating those prior discovery and sanctions orders.

civil sanctions against DuPont pursuant to its broad array of inherent powers. The Court required distribution of the Alta data and documents and imposed monetary and publication sanctions. *See* App. at 90a-93a.[5] DuPont had within its power the opportunity to mitigate, or dispense with entirely, certain sanctions.

The District Court expressly reserved any decision with regard to the disposition of the actual and potential monetary sanctions pending DuPont's election of compliance and a second hearing, expressly stating that it would set a hearing date at which it would address, among other things, the "disposition of any funds paid by DuPont into the Registry of the Court, and the assessment of court costs, attorney's fees, and expenses associated with this show cause proceeding and imposition of sanctions." App. at 93a-94a. The Court noted that such disposition could "possibly include a number of public

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[5] The civil sanctions imposed were narrowly drawn to fit DuPont's misconduct, including this publication sanction. On May 5, 1995, during the hearing, DuPont published a full-page notice in the *Wall Street Journal* which included the following statement:

> We categorically deny any and all allegations that DuPont has improperly withheld information, either in the courtroom or elsewhere. From the outset of this unfortunate situation, we have acted honorably, within the judicial process, with our customers, and in full accord with the law.

App. at 92a, quoting *Wall Street Journal*, May 5, 1995, Section A, P. 5. By then, other courts already had found DuPont had withheld discoverable Benlate information ordered produced by those courts. The Circuit Court in Hawaii had imposed a $1,500,000.00 sanction. App. at 53a.

purposes as well as those persons and entities directly affected by DuPont's conduct." *Id.* Such election and second hearing never occurred because DuPont noticed its appeal and moved for a stay pending appeal. Over Respondents' objections that the stay affected the finality of the Order, that motion for stay was granted, and the appeal followed.

The Eleventh Circuit rendered its opinion on DuPont's appeal on October 17, 1996. That Court held that the District Court possessed jurisdiction to conduct an inquiry into whether the fraud on the court had occurred and to enter sanctions against DuPont on finding that it did. App. at 7a. It also held that "a reasonable finder of fact could conclude beyond a reasonable doubt that the District Court entered a lawful order of sufficient specificity commanding DuPont to produce the Alta data and that it willfully failed to obey that order." App. at 19a. However, in considering whether to affirm, the Panel focused only on the District Court's contempt power, to the exclusion of other inherent powers, and only on DuPont's willful failure to abide by the District Court's discovery orders, to the exclusion of DuPont's other wrongful conduct. App. at 6a n.3 and at 8a-9a. This narrow view led the Circuit Court to characterize the District Court's August 21 Opinion and Order as imposing only serious criminal contempt sanctions. Concluding that the proceedings were civil but the sanctions criminal, the Eleventh Circuit reversed and remanded. App. at 10a-11a. That Court did not address DuPont's failure to raise its argument that the matter was a criminal one until filing its brief on appeal.

II. THE ELEVENTH CIRCUIT ERRED IF IT LIMITED THE DISTRICT COURT'S INHERENT POWERS TO THE CONTEMPT POWER, AND IF IT PRECLUDED AN AWARD OF CIVIL SANCTIONS IMPOSED PURSUANT TO SUCH INHERENT POWERS.

A. Introduction

Deciding that some, but not all, of the sanctions imposed were punitive, the Eleventh Circuit reversed that portion of what it characterized a contempt order and remanded for proceedings consistent with its opinion. App. at 19a. The Court was silent about civil sanctions on remand, but it did indicate that the United States Attorney should begin an investigation. App. at 11a n.7. It thus seems conclusive that the holding alleged by DuPont to conflict with *Kienle v. Jewel Tea Co.*, 222 F.2d 98 (7th Cir. 1955), *i.e.*, that the Eleventh Circuit incorrectly remanded the matter to the District Court for criminal prosecution by private parties, that is, by these Respondents, is not what the Eleventh Circuit held at all. Thus, no conflict with *Kienle* exists.

If, however, the United States Attorney is to *begin* an investigation into the matter, just what has been remanded for further proceedings? To comport with this Court's precedent, as well as with that in the Eleventh Circuit and, in a recent decision, in the Fifth Circuit, Respondents submit that the matter has been remanded to the District Court for the imposition of civil sanctions, as that term has been clarified by the Eleventh Circuit, *and* for the United States Attorney's attention. Respondents' reading of the Eleventh Circuit's Opinion avoids conflict not only with *Kienle*, but also with *Chambers* and

Carroll. If this reading is, in the view of the Court, incompatible with the opinion rendered by the Eleventh Circuit, *then this Court should indeed grant a writ of certiorari.* Respondents urge that the Court in its review consider the Eleventh Circuit's erroneous limitation on a district court's inherent powers in a civil sanctions matter, and resolve the conflict which now exists between the Fifth and Eleventh Circuits in favor of recognizing again the full array of a federal court's inherent powers, and by affirming, or remanding for, an award of civil sanctions imposed pursuant to those powers for an abuse of the judicial process.

B. The District Court Can Impose Civil Sanctions Pursuant To Its Inherent Powers, Including, But Not Limited To, Its Inherent Contempt Power.

The inherent contempt power is but one of the bundle of powers which together comprise a federal court's inherent powers. "The inherent *powers* of federal courts are those which 'are necessary to the exercise of all others'. *United States v. Hudson,* 7 Cranch 32, 34 . . . (1812). The *most prominent* of these is the contempt sanction . . . ." *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764 (1980). *See also Chambers,* 501 U.S. at 46 (inherent powers broader and narrower than other means of imposing sanctions); *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 396 (1990) (listing contempt sanctions among others); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630 (1962) (court's authority to dismiss *sua sponte* for lack of prosecution an inherent power governed not by rule or statute); *Int'l. Union, UMW v. Bagwell,* 512 U.S. 821, 833 (1994) (courts have broad authority *through means other than contempt* to

penalize party's failure to comply with rules of conduct governing the litigation process, and such judicial sanctions never have been considered criminal); *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) (federal courts have inherent power to investigate whether a judgment was obtained by fraud, to unearth such fraud effectively, and to assess the entire cost of the proceedings against the culpable party); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944) (historic power of equity to set aside fraudulently begotten judgments).

In *Carroll, supra*, 110 F.3d 290, the Fifth Circuit reviewed the district court's imposition of monetary sanctions on a litigant, post-judgment and pursuant to a show cause order, observing at the outset that a district court may rely on its inherent powers to impose sanctions when a party's deplorable conduct is not effectively sanctionable pursuant to an existing rule or statute. *Id.* at 292. That Court also noted that "other statutes and rules, such as 28 U.S.C. § 1927, Fed.R.Civ.P. 37, and the Eastern District of Texas Local Rules, do not squarely contemplate sanctions payable to the court for disruptive behavior." *Id.* at 293. In *Carroll*, the district court fined the litigant $7,000. The Fifth Circuit concluded that "[f]ines like this have been imposed by other federal courts for similar offenses." *Id.* at 294.

The Eleventh Circuit's decision limiting a district court's inherent powers to the inherent contempt power[6]

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[6] The Circuit Court incorrectly stated that Respondents here agreed that the sanctions order could not stand "without

and reversing the imposition of monetary sanctions as an improper punitive fine is in conflict with the Fifth Circuit's decision in *Carroll*, and is inconsistent with *Chambers, supra*, where this Court emphasized that neither statutes nor rules have abrogated federal courts' inherent powers to investigate and consider allegations of fraud on the court and abuse of the judicial process in proceedings which occurred before them. *Chambers*, 501 U.S. at 46. This Court in *Chambers* concluded that the inherent power of a court can be invoked even if procedural rules exist which sanction that same conduct. *See generally id.* at 47-50. *See also Nat. Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1407 (5th Cir. 1993) (citing *Chambers* and numerous cases from circuit courts for same proposition), *cert. denied*, 510 U.S. 1073 (1994). The inherent contempt power is only one of the inherent powers. The Eleventh Circuit erred in restricting the District Court, in a post-judgment inquiry, to the use of only an inherent contempt power, to the exclusion of other inherent powers, and in converting this civil matter to a criminal contempt.

This matter involved far more than the willful violation of a specific court order or series of discovery orders,

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the assistance of the district court's inherent contempt power . . . ." App. at 6a n.3. This fundamental error prompted the Court to "examine only the constitutionality of the [D]istrict [C]ourt's exercise of its inherent contempt power to determine whether the sanctions order can stand." *Id.* Consequently, a review of this matter as one concerning civil sanctions did not occur, and the entire decision was channeled toward an unnecessarily narrow fork in the road concerning "civil vs. criminal contempt", and into the labyrinth of whether a sanction is compensatory, coercive, remedial, punitive or deterrent.

which the Eleventh Circuit correctly held a reasonable finder of fact could find occurred. That Court's exclusive emphasis on the existence of an order and DuPont's willful violation of that order caused it to overlook this other sanctionable conduct and to focus solely on the issue of contempt. As in *Chambers*, *all* of DuPont's conduct was sanctionable, and no single rule was up to the task. The Eleventh Circuit erred in not considering the unchallenged findings of the District Court of these other wrongs, which wrongs could only be addressed comprehensively by imposing civil sanctions pursuant to the District Court's inherent powers. On review, the issues should be rephrased to consider the described conflict, and the Eleventh Circuit opinion should be reversed in those regards with which it conflicts with *Carroll* and the other cases cited above.

Proper review of this case as a civil sanctions matter emphasizes whether, under the circumstances, the District Court abused its discretion in " 'fashion[ing] an appropriate sanction for conduct which abuses the judicial process.' " *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995), quoting *Chambers*, 501 U.S. at 44-45. *See also Topalian v. Ehrman*, 3 F.3d 931, 934 and 936 (5th Cir. 1993) (all sanctions reviewed for abuse of discretion); *Nat. Gas Pipeline Co.*, 2 F.3d at 1410 (reviewing court should view district court's sanctioning action "in a favorable (that is to say permissible) light"). The Eleventh Circuit never recognized this standard in its opinion, and that failure exacerbated, if not caused, its erroneous view of the case. The District Court fashioned and imposed appropriate civil sanctions against a litigant which beyond a reasonable doubt abused the judicial process. It made specific

factual findings to support its decision and to permit rigorous appellate review. *See Topalian*, 3 F.3d at 936. If any abuse of discretion were discovered on proper review, it could be described, and the matter remanded to the District Court for new sanctions properly fashioned consistent with the decision.[7]

A review of DuPont's first issue permits DuPont, which neither raised the issue in the District Court nor urged it in emergency motions to the appellate court, to litigate the matter civilly and then raise for the first time on appeal a claimed constitutional due process issue. *See Michel v. State of Louisiana*, 350 U.S. 91, 99 (1955) (constitutional rights may be forfeited in criminal as well as in civil cases by failure to assert timely that right), citing *Yakus v. United States*, 321 U.S. 414, 444 (1944). To accept as proper the conversion of this matter into one for criminal contempt at that late stage because the civil sanctions might have punitive and deterrent aspects

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[7] Because the District Court granted DuPont's motion to stay the sanctions Order pending appeal, thereby staying DuPont's obligation to make manifest its intentions to comply with the Order, the Court neither conducted the intended second hearing nor discussed any disposition of the funds. Even with this impediment, the Eleventh Circuit recognized the remedial, compensatory and coercive aspects of certain sanctions. App. at 9a and 10a at n.5 and n.6. But then, inconsistent with that recognition and without consideration of the effect of the stay, the Circuit Court concluded that the sanctions were punitive because DuPont was ordered to pay funds into the registry of the Court, a conclusion which ignores the clear intent of the District Court to do something further. Under *Carroll*, even a fine paid to the registry of the Court is a sanction within the District Court's discretion.

ignores Supreme Court authority that such aspects are appropriate and establishes a rule that anything less than solely remedial, compensatory and coercive sanctions may not be imposed. *See, e.g., Chambers,* 501 U.S. at 53-55; *Hicks on Behalf of Feiock v. Feiock,* 485 U.S. 624, 635-36 (1988); *Cooter & Gell,* 496 U.S. at 398. The Eleventh Circuit's decision is clearly inconsistent with the *Carroll* case, where the Fifth Circuit affirmed as an appropriate civil sanction the imposition of a monetary fine payable to the registry of the court. *Carroll,* 110 F.3d at 292 and 294.[8]

This Court should exercise its supervisory power to settle this conflict and decide the important matter of the scope of a federal court's inherent powers to sanction litigants post-trial for abuse of the judicial process. This Court's decision that the District Court properly employed all of its inherent powers necessarily overcomes the "civil vs. criminal contempt" dichotomy and any perceived errors regarding serious criminal contempt sanctions.

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[8] *See also Donaldson v. Clark,* 819 F.2d 1551, 1557 n.6 and n.7 (11th Cir. 1987) (*en banc*) (discussing monetary sanctions and publication sanctions); *In re Mroz,* 65 F.3d at 1575 (attorney's fees as sanctions); *Malautea v. Suzuki Motor Co., Ltd.,* 987 F.2d 1536, 1545-46 (11th Cir. 1993) (fines imposed on defendants and defense counsel).

III. SHOULD THE MATTER REMAIN ONE FOR CIVIL SANCTIONS, THE ELEVENTH CIRCUIT ERRED BY ORDERING THAT THE MATTER ON REMAND BE ASSIGNED TO A DIFFERENT DISTRICT COURT JUDGE.

After issuing its opinion, the Eleventh Circuit, without briefs, findings, citation to authority, or opinion, ordered that upon remand the Chief Judge reassign all future proceedings in this action to a different Judge. No jurisdiction exists in the Eleventh Circuit to make original findings of fact and conclusions of law so as to disqualify a District Judge from presiding in a case over which that District Court had jurisdiction, where on appeal no error of law was presented concerning his disqualification. No error was assigned, nor was any hearing held where briefing or argument was permitted, with regard to removal of the District Judge from presiding over the case. This subsequent Order, entered on November 4, 1996, is contrary to law and without basis in fact, inasmuch as the Eleventh Circuit previously had entered an Order dated May 1, 1995, denying both DuPont's Petition for Writs of Mandamus and Prohibition, and its Emergency Motion to Stay, by which DuPont sought removal of the District Judge from hearing the original proceeding for sanctions.

Entry of the November 4 Order is contrary to law and unconstitutional as to Respondents.[9] No statutory or constitutional authority exists for entry of such an Order,

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[9] It is likewise violative of the District Court Judge's Constitutionally guaranteed rights of due process, particularly as afforded by 28 U.S.C. § 455.

and reassignment to another District Judge would entail waste and duplication out of all proportion to any gains realized from reassignment, particularly where as here the history involves and the record includes an initial lengthy jury trial, followed by a lengthy sanctions hearing. There exists no admissible, credible evidence of an objective appearance of bias or prejudice or improper impartiality which derives from an extra-judicial source or which reveals such a high degree of favoritism or antagonism as to make fair judgment impossible as required by *Liteky v. United States*, 510 U.S. 540 (1994). *See also United States v. Bertoli*, 40 F.3d 1384, 1412-13 (3rd Cir. 1994) (following *Liteky*, and holding both that the record did not warrant the District Judge's recusal from the case, and that reassignment upon remand was inappropriate). The *Bertoli* Court found it especially important that the court *not* encourage tactics designed to force recusal, being keenly aware of the impact recusal might have on the conduct of all disputed matters and cases that District Judges try.

Such forced recusal creates a potential for mischief and mischaracterization to the point of subversion of justice. The only statutes dealing with disqualification for bias or prejudice are 28 U.S.C. §§ 144 and 455. While 28 U.S.C. § 2106 allows a court of appellate jurisdiction to remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings be had, as may be just under the circumstances, that statute contains no express legislative provisions concerning disqualification and/or transfer of District Judges by remand order of an appellate court. Section 2106 is too vague and indefinite to supersede the specific

statutes dealing with bias or prejudice to disqualify a judge. A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . . ." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). Any construction and/or application of Section 2106 as authority for the Order is contrary to law, null, void and unconstitutional in that it would deny due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and would violate the Separation of Powers provisions where the Legislative Branch of Government under Article III of the United States Constitution provides for the vesting of judicial power in such inferior courts as Congress may from time to time ordain and establish.

Even if Section 2106 were to be constitutional in content, construction and application, an important question of federal law not yet decided by this Court, *Liteky* puts to rest the first two factors identified under prior case law on reassigning this case on remand under that Section. Whether the District Judge would have difficulty putting his previous views and findings aside, and whether reassignment is appropriate to preserve the appearance of justice, were decided adversely to DuPont by the District Court on April 26, 1995. As to that Order, no appeal was taken or error assigned by DuPont. The final factor – whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment – as discussed above, completely negates transfer to another District Judge. The Eleventh Circuit erred in so ordering.

IV. DUPONT'S ISSUES LACK MERIT.

Upon the grant of certiorari, review of the issues as suggested by Respondents, and reversal of those portions of the Eleventh Circuit opinion in conflict with *Chambers* and *Carroll*, any holding made by the Eleventh Circuit with respect to the findings of the District Court serving as a basis for a criminal contempt against DuPont would also be vacated. However, if this Court were to consider only the issues submitted by DuPont with respect to whether certiorari should be granted, the writ should not be granted, because DuPont's issues lack merit.

On appeal, DuPont expressly sought *vindication* for its conduct, asking that, notwithstanding any ruling on other issues which might lead to the reversal of the District Court's imposition of civil sanctions, the Eleventh Circuit conclude that no evidence supported criminal contempt. The Court thus considered, at DuPont's urging, the narrow question of whether there was sufficient evidence that DuPont was ordered to produce the Alta data. On review of the record, the Eleventh Circuit concluded that "a reasonable finder of fact could conclude beyond a reasonable doubt that the District Court entered a lawful order of sufficient specificity commanding DuPont to produce the Alta data and that it willfully failed to obey that order." App. at 19a.

Now displeased with the Eleventh Circuit's conclusions, DuPont mixes different issues and different standards in a vain attempt to create an issue worthy of review. DuPont states that the Eleventh Circuit's decision is in conflict with other circuit courts of appeals because it includes as an element of a criminal contempt a factual

finding that the District Court entered a lawful order of reasonable specificity, and because on review of a conviction for criminal contempt, the court would apply the sufficiency of the evidence standard of review. DuPont argues wrongly that the Eleventh Circuit's decision in these regards is somehow in conflict with cases cited in its Petition at 13-14. *Harris v. City of Philadelphia*, 47 F.3d 1333, 1340 n.5 (3rd Cir. 1995), stands at most for the propositions that questions of law are reviewed *de novo* and that "[w]hether the notice provided conformed to legal requirements is a question of law . . . ." The Third Circuit expressly stated that it did not "exercise plenary review over the district court's findings of fact or ultimate finding of contempt except to the extent that the finding of contempt rests on an erroneous conclusion of law." *Id.* at 1340 n.5. Neither in *United States v. O'Quinn*, 913 F.2d 221 (5th Cir. 1990), nor in *Downey v. Clauder*, 30 F.3d 681 (6th Cir. 1994), does either court describe the standard of review as *de novo*, as DuPont contends.

The Eleventh Circuit never indicated that the vagueness or overbreadth of a court order, which were the inadequacies alleged in *Harris*, *O'Quinn* and *Downey*, could not be subject to a legal ruling and reviewed on appeal *de novo*. The Court cited authority to that effect. *See* App. at 12a, citing *United States v. Koblitz*, 803 F.2d 1523 (11th Cir. 1986). There simply is no conflict, primarily because the Eleventh Circuit merely addressed DuPont's argument that no evidence supported the District Court's findings. The Eleventh Circuit did not address every issue which *might* have arisen.

DuPont wrongly contends that the Eleventh Circuit retroactively applied to the facts of this matter an

amended rule of civil procedure. If true, that issue might merit review. It is not. DuPont misleadingly reduces what actually transpired, and what the District Court and the Eleventh Circuit found and held, to three factors. *See* DuPont's Pet. at 15. The District Court set forth fully the extent and scope of DuPont's willful misconduct, *see* App. at 30a-54a, and its reasoning concerning DuPont's duty to produce and not to conceal the information about which much of this controversy revolves. *See id.; see also id.* at 59a-78a. Contrary to DuPont's representations here, its misconduct and the District Court's reasoning extend well beyond any single order. The District Court did not in any way base its decision to impose civil sanctions on Fed.R.Civ.P. 26(e) as amended. *See, e.g.*, App. at 62a-63a (quoting Fed.R.Civ.P. 26(e)(3) as it existed prior to the 1993 amendments). Nor did the Eleventh Circuit authorize retroactive application of that Rule, as amended, to DuPont's discovery obligations or to support any criminal conviction. The Eleventh Circuit cited to amended Rule 26 in footnote 8, but it did not at any point suggest that the violation of that Rule as amended could support a finding of criminal contempt.[10] At that juncture of its

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[10] Importantly, as it pertains to this case, the portions of the Rule as cited and relied on by the District Court are identical in meaning to the portions of the Rule as amended and cited by the Eleventh Circuit. *See* App. at 63a and App. at 14a (both courts emphasizing the duty to supplement or correct incomplete or incorrect responses if ordered by the court). Also important to this issue are that Plaintiffs in *Bush Ranch* propounded new requests for supplementation on May 24, 1993, and that DuPont responded falsely to said requests twice, on June 28, 1993, and on July 26, 1993, after the tests were conducted by Alta Labs, after the deposition of DuPont's expert who testified falsely

opinion, the Court was discussing the language of the discovery requests propounded by Plaintiffs in *Bush Ranch* and any express limitations therein. Later, the Court emphasized that "the question before this Court is not what the Federal Rules of Civil Procedure *required* DuPont to produce, but instead what a reasonable finder of fact could conclude that the district court *ordered* DuPont to produce." App. at 16a-17a n.9 (emphasis in original). The Eleventh Circuit also emphasized that the District Court "specifically ordered DuPont to go back and review its responses to the Plaintiffs' first request for document production and to fill in immediately *'all gaps* in documents responsive to Plaintiffs' original discovery requests.' " App. at 17a (quoting March 15, 1993, Order at 4) (emphasis added by Eleventh Circuit).

DuPont's second and third issues are manufactured ones that do not comport with either the facts of the case or the Eleventh Circuit's Opinion. All of DuPont's issues are entirely predicated on this matter being concerned solely with criminal contempt. When this case is read to concern the imposition of civil sanctions pursuant to *all* of the District Court's inherent powers, DuPont's issues become moot.

The Eleventh Circuit has reversed and temporarily relieved DuPont of any sanction for its misconduct. What DuPont seeks now is an advisory opinion from this Court

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about the tests, and, as to the later date, after three weeks of the *Bush Ranch* trial.

to substitute for those portions in the nature of an advisory opinion rendered by the Eleventh Circuit. This Court's resources should not be so wasted.

V. CONCLUSION

DuPont's issues do not merit review. This Court should review this case, if at all, only if the Eleventh Circuit has disallowed the imposition of civil sanctions against DuPont on remand, and if reviewed, it should be reviewed upon the important issues identified by Respondents. Alternatively, the decision of the Eleventh Circuit should be summarily reversed and the District Court decision affirmed in its entirety.

Respectfully submitted,

C. Neal Pope*
Max R. McGlamry
Wade H. Tomlinson, III
Pope, McGlamry, Kilpatrick
& Morrison, LLP
318 11th Street, 2nd Floor
Post Office Box 2128
Columbus, Georgia 31902-2128
(706) 324-0050

Richard H. Gill
Copeland, Franco, Screws
& Gill, P.A.
444 South Perry Street
Post Office Box 347
Montgomery, Alabama 36101
(334) 834-1180

Attorneys for Respondents

**Counsel of Record for Respondents upon whom service is to be made.*